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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 604

SKIBS. A/S MARIE BAKKE,
Petitioner

v.

OTIS, McALLISTER & CO., a corporation,
Respondent.

MOTION UNDER RULE 42 (1) FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION UNDER RULE 42 (1) FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

American President Lines, Ltd., one of America's largest steamship companies, presently operating 27 vessels in Trans-Pacific and round-the-world services essential to the foreign commerce of the United States under the Merchant Marine Act of 1936, as amended, is gravely concerned with and adversely affected by the ruling below of the United States Court of Appeals (260 F. 2d 181), and respectfully suggests that the Federal maritime question involved is of such importance to the American Merchant Marine, and so affects the foreign commerce of the United States, as to warrant the granting of (a) the petition for a Writ of Certiorari, and (b) this motion for leave to file a brief *amicus curiae*.

Consent of petitioner has been given to the filing of a brief *amicus* by American President Lines, Ltd., but the respondent has refused its consent.

Squarely at issue is the bald question whether a bill of lading clause (in respect of goods worth less than $500 per package or customary freight unit), similar to those heretofore declared by this Court to be valid "true valuation clauses" for measuring cargo damages is outlawed by the U. S. Carriage of Goods by Sea Act, 1936.

The time taken for the issue to reach this Court is no reflection on its importance. It may be explained by the fact that although the valuation clause is involved in the great majority of multitudinous cargo claims filed against ocean carriers, and although the amounts involved in the aggregate are exceedingly large, nevertheless the individual claims involving application of the valuation clause, separately considered, rarely involve large amounts. For example, the amount involved in the instant "test case" is $3,555.83. When we multiply this illustrative claim by the hundreds of similar claims filed against American President Lines,

Ltd., as only one carrier, every year, the importance of the issue becomes apparent.

A further important consideration here involved has a direct bearing on judicial administration in the United States. By voiding the true valuation clause in petitioner's bill of lading, similar to such clauses in the bills of lading of American President Lines and other carriers, the Court of Appeals has opened the floodgates for litigation of literally thousands of relatively small cargo damage claims. The decision below would suppress practical, fair, simple and uncontroversial methods of measuring the value of goods by their invoice cost, plus insurance, freight and duties, as provided in the valuation clause.

Shippers and carriers, by reason of the decision below, are left to argue over, take testimony with respect to, and litigate as a fact to be determined in each instance (by conflicting evidence of fluctuating "markets", "expert testimony", and other varying or ephemeral circumstances) the actual "sound market value" of particular goods at the time when delivery was or should have been made at destination. Surely no sound judicial or public policy calls for any such result. Nothing in the 1936 Act (COGSA) here invoked by respondent calls for any such conclusion.

The true valuation clause relieves both parties to the contract of carriage from speculative factors and market fluctuations which, in the absence of the clause, cause one or the other of the parties to suffer solely in consequence of market conditions over which neither have any control. The clause measures the value of goods, and the shipper's damages, on the basis of the shipper's actual out-of-pocket expenses. The clause removes the elements of speculation and uncertainty and tends to stabilize freight and insurance

rates. It is consistent with the commercial practice of shippers and consignees in respect of cargo valuations for insurance purposes.

C. I. F. is the customary commercial measure of indemnity between shipper and consignee (or buyer and seller) in the ordinary transaction involving shipment of goods. (The carrier is not an insurer, but only liable for faults specified in COGSA). This commercially accepted measure of indemnity (by way of insurance) is equally appropriate and fair when spelled out in the bill of lading contract for application in circumstances where the carrier is liable to the goods owner for faults not excused by COGSA. Whether the goods owner is paid by his insurance underwriter (as where there is no fault on the part of the ocean carrier), or by the ocean carrier (in circumstances where the carrier is responsible) C. I. F. is the fair, practical and customary method of indemnity.

Because of the importance of the Federal maritime question here involved, and because the brief *amicus* annexed hereto points to clearly the erroneous empirical conclusion of the Court of Appeals below not similarly discussed in the petition for writ of certiorari, movant respectfully requests the Court to receive and consider the annexed brief in support of the petition.

Respectfully submitted,

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January 26, 1959.

INDEX TO BRIEF

	PAGE
Jurisdiction	1
Statutes Involved	1
Question Involved	1
The Facts	1
Reasons for Granting Writ	2
Argument	3
I. The Court Below Has Confused Negligence Clauses Proscribed by the Statutes and the Courts With True Valuation Clauses Heretofore Approved by This Court and Not Proscribed by the Statutes	4
II. The Decision of the Court of Appeals Below Relies Upon Unsound or Distinguishable Lower Court Cases of Doubtful Authority.	6
Conclusion	9

BRIEF AMICUS CURIAE OF AMERICAN PRESIDENT LINES, LTD. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction

Petitioner has invoked jurisdiction of this Court under 28 USC 1254 (1).

Statutes Involved

The statute involved is the U. S. Carriage of Goods by Sea Act, 1936 (46 USC 1300-1315), pertinent sections of which are quoted in the petition,

By the way of analogy the Harter Act of 1893 (46 USC 190-195) is also involved and its pertinent sections are quoted in the petition.

Question Involved

Is a "true valuation clause" similar to those heretofore declared valid (*Smith* v. *The Ferncliff*, 306 U. S. 444) in ocean bills of lading governed by the Harter Act of 1893, valid in ocean bills of lading which are governed by the U. S. Carriage of Goods by Sea Act of 1936?

The Facts

There is no dispute on the facts. Petitioner is a steamship company whose Motorship MARIE BAKKE carried a shipment of coffee from Peru to San Francisco. Petitioner's liability is conceded with respect to negligent loss of part of the shipment, and physical damage to another part. Respondent (libellant-appellant in the Court of

Appeals) was the coffee importer. Respondent took issue with the petitioner ocean carrier with regard to the validity of the following standard "true valuation clause" in the bill of lading contract covering the shipment:

> "it is agreed that in view of the difficulty of determining in advance what the market value of the goods will be upon arrival at destination (this being the common law basis of determining damages), the 'agreed value' thereof . . . shall be an amount equal to the shipper's invoice value, if any, . . . plus freight, insurance and duties . . . irrespective of whether any other value is greater or less . . ." (Tr. 43).

The current "market value" of the coffee in sound condition upon arrival of the MARIE BAKKE at destination was $00.0596 per pound higher than the f.o.b. invoice value plus freight, insurance and import duties. [Had the market value been lower per pound than the C. I. F. value the case would not have arisen.] Because the market value was higher than the C. I. F. value the importer (respondent) refused to accept indemnity from petitioner in keeping with the bill of lading clause. The importer claimed damages measured by market value, and characterized the bill of lading clause as invalid attempt by respondent to "limit" its liability in contravention of the U. S. Carriage of Goods by Sea Act. The District Court sustained the bill of lading clause (Tr. 46). The Court of Appeals reversed (260 F. 2d 181).

Reasons for Granting Writ

1. An important issue of Federal maritime law is involved affecting the foreign commerce of the United States and those directly concerned with it, including shipowners, marine insurance underwriters, exporters and importers.

For the benefit of the divers interests directly and indirectly concerned the issue, of long standing, should be decided authoritatively.

2. The decision of the Court of Appeals is contrary to prior decisions of this Court upholding just such clauses in bills of lading governed by the analogous Harter Act of 1893, which still applies to coastwise and intercoastal shipments.

3. The decision of the Court of Appeals opens up a vast floodgate of litigation by voiding a true and fair valuation clause and imposing upon the shipping and export-import industries a commercially rejected, difficult, expensive and indeterminate method of determining cargo damages in connection with individually small (under $500 per package) but numerically most extensive cargo claims.

4. The interests of effective judicial administration and the avoidance of a multiplicity of lawsuits with respect to a constantly recurring and now unsettled important Federal maritime question, warrant the granting of the petition for a writ of certiorari.

Argument

Supplementary to the matters stated in the petition, we believe that the clear error of the Court of Appeals below can be further demonstrated by brief discussion of (a) the background and purposes of the Carriage of Goods by Sea Act, and (b) the cases upon which the Court below appears to have relied as authorities for its conclusion.

I.

THE COURT BELOW HAS CONFUSED NEGLIGENCE CLAUSES PROSCRIBED BY THE STATUTES AND THE COURTS WITH TRUE VALUATION CLAUSES HERETOFORE APPROVED BY THIS COURT AND NOT PROSCRIBED BY THE STATUTES.

Before enactment of the Harter Act, 1893, the Federal and most of the State Courts had proscribed clauses in ocean bills of lading which attempted to exempt or lessen the carrier's common law liability for loss or damage occasioned by the carrier's negligence. Such "negligence clauses" were deemed invalid as contrary to public policy in the United States. Clauses falling under this proscription included those whereby common carriers attempted to lessen or avoid their liability for loss of or damage to goods in consequence of unseaworthiness, negligent stowage, care and custody of goods, and unexplained loss. Under the Harter Act of 1893 (still applicable to coastwise and intercoastal shipments) and under the 1936 Carriage of Goods by Sea Act (governing all bills of lading in foreign commerce of the United States), certain "negligence clauses" within the limited permissive scope of the statutes have been enforcible, subject however to exercise by the carrier of due diligence requirements (Viz.: 46 U. S. C. § 1304). Any attempt, however, by the carrier to avoid or lessen its substantive obligations or duties beyond the scope permitted in the statutes are declared void [Harter Act 46 U. S. C. §§ 190, 191; Carriage of Goods by Sea Act, 46 U. S. C. § 1303(8)].

Frequently confused with the "*negligence*" clauses proscribed or regulated by the Harter and Carriage of Goods by Sea act, but falling in a different category, is the so-called "*limitation of liability*" clause, limiting the amount of damages recoverable from the carrier after substantive liability has been established.

The Harter Act is silent with respect to such limitation agreements in bills of lading. Bill of lading limits of $100 per package were common before 1936. The Carriage of Goods by Sea Act, 1936, expressly limits the carrier's liability to an amount not exceeding "$500 per package". [46 U. S. C. § 1304(5)]. Under the Harter Act, limitation clauses were declared valid so long as the shipper had an option of declaring a higher valuation upon payment of a higher freight rate. Under the Carriage of Goods by Sea Act the limitation is set by statute at a maximum of $500 per unit "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading" [46 U. S. C. § 1304(5)]. In short the Carriage of Goods by Sea Act provides for a fixed maximum limitation of $500 per package in lieu of the more flexible "released rate" limitation clauses theretofore considered valid.

With respect to goods valued at less than $500 per package, the Carriage of Goods by Sea Act, like the Harter Act, is silent. The clause at issue in the instant case deals only with the *measure of damages* with respect to such goods. *It is neither a "negligence clause," nor a "limitation clause."* It is, rather, a clause that has been approved by the Court and characterized as a *"true valuation clause."* Such clauses have been upheld consistently by the courts both before and after the enactment of the Harter Act, 1893. [See *Smith* v. *The Ferncliff* (1939) 306 U. S. 444; *cf. The Ansaldo San Giorgio* I (1935) 294 U. S. 494]. No special consideration or choice of rates is necessary to their validity. They measure *damages* (after *liability* has been determined) on the basis of the goods owner's actual damages, viz., cost, insurance, freight and duty, rather than by the speculative happenstance of ephemeral market conditions at time and place of delivery. Nothing in the Carriage of Goods by Sea Act prohibits such clauses; there is no policy or reason to justify invalidating any such clause by inference or otherwise.

II.

THE DECISION OF THE COURT OF APPEALS BELOW RELIES UPON UNSOUND OR DISTINGUISHABLE LOWER COURT CASES OF DOUBTFUL AUTHORITY.

Two decisions in the Southern District of New York, reported unofficially in American Maritime Cases (one of which is abortively so reported), provide the principal basis upon which the Court below appears to have reached its conclusion. Here is a perfect example of error being compounded by error. The Court cites as precedent the "excellent opinion" of a commissioner, affirmed without comment by District Judge Clancy, in the *Harry Culbreath*, 1952 A. M. C. 1170 (not officially reported). The commissioner, in turn, relied upon the unofficial report of the *George E. Pickett* (S. D. N. Y.) in 1948 A. M. C. 453. This case officially reported at 77 F. Supp. 998, involved claim for damages to hides. The carrier was held liable on the merits, and the official opinion of the District Court (Judge Ryan) contains no discussion of damages or the valuation question. In the unofficial A. M. C. report, however, there is gratuitously appended a "Statement" that the bill of lading involved was a War Shipping Administration (U. S. Government) form, known as a "Warshipbading", which contained a C. I. F. valuation agreement. The A. M. C. "Statement" (p. 456) indicates that an interlocutory decree was entered in favor of the libellant "for its damages based on the market value of the skins in sound condition at New York**." This, coupled with the unofficial A. M. C. headnote, p. 453, is misleading. Examination of the files in the District Court proceeding indicates that each of the bales exceeded $500 in value, and liability was limited to $500 per bale as to those totally lost. Four other bales, having a sound market value of 65¢ per skin, were damaged to an extent of 10%, on the basis of which

recovery was had in the sum of $260. The valuation clause was not at issue and was not discussed by the Court.

Other "authorities" relied upon the commissioner in the *Harry Culbreath* are equally distinguishable. E.g. *The Campfire* (2 Cir. 1946) 156 F. 2d 603, dealt with a "pro rata clause" and did not concern the question here involved. *Sanib* v. *United Fruit Co.* (S. D. N. Y. 1947) 74 F. Supp. 64, dealt with an invalid *limitation* clause, not with a *true valuation* clause such as here involved.

The Court of Appeals below, empirically following the *Harry Culbreath*, similarly cited in support of its conclusion the Canadian case of the *Cape Corso*, 1954 Lloyd's List L. R. (Vol. II) 40. There the learned Judge relied upon what he thought to be American law. Thus he observed, for example, "even in *Smith* v. *The Ferncliff*, the Supreme Court indicated quite plainly that the clause upheld under the Harter Act would have been bad under the new (COGSA) Act." The conclusion of the Canadian Court as to the opinion of this Court in *The Ferncliff* is, we submit, wholly unwarranted. The commissioner in the *Harry Culbreath* initiated the impression picked up by the Canadian Court, and in turn, the Court of Appeals below cited both as authority for its own stated conclusion that Mr. Justice McReynolds' *dictum* in *The Ferncliff* signified that an otherwise valid clause is rendered invalid by the 1936 Act. What Mr. Justice McReynolds said was:

> "The particular question (of invoice value) is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act, § 4(5) 46 USCA § 1304(5)." (p. 450)

We submit that this *dictum* is easily explained and was not intended as a ruling by this Court on the point now at issue. The *dictum* is traceable to an observation made by Judge Chesnut when *The Ferncliff* was before the District

Court. He had declared that the question was not likely to arise again, and spoke of it as "regulated" by the Carriage of Goods by Sea Act. (22 F. Supp. at pp. 742-3). In a later case he corrected or at least modified this impression. See *The Steel Inventor*, 35 F. Supp. 986, at p. 998. There he observed that while he did not have to decide the question, nevertheless a "true valuation clause" might still be valid under the 1936 Act! However, the "damage had been done". Judge Chesnut's *dictum* in *The Ferncliff* was picked up by the Court of Appeals for the Fourth Circuit which, in certifying the case to this Court, said:

> "Notwithstanding the passage of the Carriage of Goods by Sea Act of April 16, 1936 . . ., the question as to the correct method of computing damages under a valuation clause is deemed an important one, as to which an authoritative decision would seem desirable." (306 U. S. at p. 447).

By such slender threads has confusion been compounded. An authoritative decision by this Court on the question in respect of the Carriage of Goods by Sea Act, 1936 is, indeed, now desirable.

Considerations of brevity preclude further observations which could be made in like vein with regard to the "precedents" upon which the Court of Appeals below seems to have reached its conclusion. It is hoped that these few illustrations are sufficient to emphasize adequately the importance of the question, the confusion that has been engendered by the lower court rulings, and the great need for an authoritative ruling on the question by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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